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LEAVING THE *DALE* TO BE MORE *FAIR*: ON *CLS V. MARTINEZ* AND FIRST AMENDMENT JURISPRUDENCE

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INTRODUCTION

In *Christian Legal Society of the University of California, Hastings College of the Law v. Martinez*,[1] the Supreme Court upheld the Hastings College of the Law's requirement that all recognized student groups have an open membership policy. The decision has been criticized for a variety of reasons including, for example, that the Court conflated the First Amendment tests for speech and association.[2] What has not been adequately explored is the degree to which the Court has modified the limited-purpose-public-forum analysis in the university context over the past few decades, resulting in a jurisprudence that is virtually unrecognizable in light of the more general First Amendment doctrines. While the Court is appropriately criticized for the way that it has sometimes interpreted First Amendment protections of speech and association, both as a general matter and in the university context in particular, the *Martinez* reasoning and result make the best of a jurisprudence that has lost its moorings.

To make sense of what was at issue in *Martinez*, one must consider two lines of First Amendment cases—those involving the conditions under which the state is permitted to impose limitations on

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1. 561 U.S. ___, 130 S. Ct. 2971 (2010).

2. *See, e.g.*, Natalie M. Cooley, Casenote, *The Abdication of Free Association–Elevating the Court Above the Constitution in* Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, 64 SMU L. REV. 765, 769 (2011) ("The major flaw in the majority's argument is that it conflates CLS's free speech and expressive association claims.").

citizens' free speech rights, on the one hand, and on citizens' associational rights, on the other. One must also consider how the Court has applied forum jurisprudence in the university context. Once those lines of cases are clear, especially as applied in the higher education context, the *Martinez* decision will appear unsurprising. What may appear remarkable, however, is the degree to which the Court has mangled its own jurisprudence while allegedly attempting to apply it. *Martinez* involves a measured attempt to apply First Amendment protections and limitations within some of the confines set by the Court in previous cases. The case is less noteworthy for its result than for its attempt to correct and situate some of the previous cases and holdings and, for that reason, is much more praiseworthy than is commonly acknowledged.

Part II of this Article discusses free speech jurisprudence, focusing on forum analysis and how it has been applied in the university setting. Part III focuses on the right to association jurisprudence, especially in light of how it has been analyzed with regards to antidiscrimination protections. Part IV examines *Martinez* in light of these two strands of First Amendment jurisprudence, explaining how many of the criticisms of the opinion miss the mark. The Article concludes that *Martinez* is best understood as a decision that attempts to return free speech and association jurisprudence to a system that is both more recognizable and more readily applied, a somewhat daunting task in light of some of the Court's previous misapplications of existing doctrine.

II. SPEECH LIMITATIONS

While the U.S. Constitution has long afforded special protection to freedom of expression, there is no absolute right to say whatever one wants whenever one wants.[3] The need for limitations on speech is clear, the importance of free speech notwithstanding. Those limitations have often been spelled out with reference to the distinction between viewpoint and content discrimination, especially when the state

3. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 668 (1996) ("[T]he First Amendment does not guarantee absolute freedom of speech . . . .").

limitations are imposed in a forum not generally available for speech.[4] Regrettably, the jurisprudence in this area has become confused, particularly when the speech is taking place in a university setting.

A. Forum Jurisprudence

The constitutionality of state limitations on speech often depends upon the context in which a citizen has been prevented from engaging in free expression. As Justice Oliver Wendell Holmes famously explained in *Schenck v. United States*,[5] "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[6]

Preventing a panic and the resulting loss of life and limb is a compelling state interest.[7] That said, it should not be thought that the *only* time that speech is unprotected by the First Amendment is when it would result in harm—context matters. As the Court explained in *Perry Education Association (PEA) v. Perry Local Educators' Association*,[8] "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[9]

The *Perry* Court outlined the different kinds of fora and the corresponding differing state burdens for justifying speech limitations—"[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."[10] For example, "streets and parks . . .

4. *See* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007) (citing Cornelius v. NAACP Legal Def. & Ed. Fund, Inc., 473 U.S. 788, 799–800, 806 (1985)) ("[W]hen the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.").

5. 249 U.S. 47 (1919).

6. *Id.* at 52.

7. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., concurring and dissenting) (describing the protection of "society from loss of life and limb, [as] a legitimate, indeed compelling, state interest").

8. 460 U.S. 37 (1983).

9. *Id.* at 44.

10. *Id.* at 45.

'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[11] If the state imposes a content-based speech restriction in such a setting, the strict-scrutiny standard requires the state to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[12] Thus, it will be extremely difficult for the state to justify imposing a content-based distinction in a forum that has been traditionally reserved for the discussion of public questions.[13]

The test for when a limitation is permissible is less daunting, however, when the state is not seeking to impose a content-based regulation but, instead, is merely trying to enforce a time, place, or manner restriction. In that event, the regulations must merely be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[14] Further, the narrow tailoring that is required to justify a time, place, or manner restriction is not as strict as the tailoring required for a content-based restriction in a traditional public forum.[15]

Very few fora have been used for public discussion from time immemorial—they seem limited to streets, parks, and sidewalks,[16] although even this list has been qualified by the Court. For example, the sidewalk leading from a parking lot to a post office was not classified as a public forum,[17] its similarity to a municipal sidewalk notwithstanding.[18]

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11. *Id.* (quoting Hague v. Comm'n for Indus. Org., 307 U.S. 496, 515 (1939)).

12. *Id.* (quoting Carey v. Brown, 447 U.S. 455, 461 (1980)).

13. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) ("[G]overnment entities are strictly limited in their ability to regulate private speech in . . . 'traditional public fora.'") (citing Cornelius v. NAACP Legal Def. & Ed. Fund, Inc., 473 U.S. 788, 800 (1985)).

14. *Perry*, 460 U.S. at 45 (citing U.S. Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 132 (1981)).

15. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so.").

16. *See* United States v. Grace, 461 U.S. 171, 177 (1983) (citing *Perry*, 460 U.S. at 45).

17. United States v. Kokinda, 497 U.S. 720, 727 (1990) ("The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry*."); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v.

Merely because there are relatively few traditional fora does not mean that strict scrutiny will rarely be invoked. The *Perry* Court explained that the narrow tailoring test will be used if the speech limited by the State would have taken place on "public property which the State has opened for use by the public as a place for expressive activity."[19] Although the Constitution does not require states to set up general purpose public fora in addition to those traditionally recognized, the "Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."[20] Thus, state entities that set up a public forum for free expression are severely limited with respect to the kinds of content-based restrictions that it can impose on that forum.[21]

A state that creates a general-purpose public forum is not thereby required to maintain that forum indefinitely.[22] Nonetheless, while the forum retains that characterization, the limitations on the traditional public forum are also applicable to the state-created, general-purpose public forum.[23]

The *Perry* Court noted that a "public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects . . . ."[24] As the Court in *Rosenberger v. Rectors &*

Lee, 505 U.S. 672, 680 (1992) ("But given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity.") (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

18. *See Kokinda*, 497 U.S. at 727 ("Respondents contend that although the sidewalk is on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum and therefore subject to strict scrutiny.").

19. *Perry*, 460 U.S. at 45.

20. *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

21. *See id.*

22. *Id.* at 46 (stating that "a State is not required to indefinitely retain the open character of the facility").

23. *See id.* (noting that as long as the state retains the open character of the forum, the state "is bound by the same standards as apply in a traditional public forum").

24. *Id.* at 46 n.7 (citing Widmar v. Vincent, 454 U.S. 263 (1981)); *see* Madison Joint Sch. Dist. v. Wis. Pub. Emp't Relations Comm'n, 429 U.S. 167 (1976).

Visitors of the University of Virginia[25] later explained, where the state has set up a limited-purpose public forum, "the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum . . . .'"[26] In addition, the State is prohibited from discriminating "against speech on the basis of its viewpoint."[27] Thus, speech that fits within the limitations of the forum cannot be excluded absent a compelling justification, although speech not falling within those limitations can be excluded as long as the limitations are reasonable.

One final category should be mentioned. Some government-owned fora simply are not intended for public expression. If such a forum has been created, the government has great discretion to decide who has access to the forum and how it will be used. The *Perry* Court explained that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."[28] The standards applicable to a public forum are not applicable in the context of a nonpublic forum in that some distinctions that are "impermissible in a public forum . . . are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property."[29] The test for determining whether a nonpublic forum has been limited in an unconstitutional way is simply whether the limitations "are reasonable in light of the purpose which the forum at issue serves."[30]

The *Perry* distinctions are more easily understood after an examination of the controversy at issue in that case. Two groups, the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA), had each sought to be the official union representative of the district's school teachers.[31] The PEA won and was permitted to "have access to the interschool mail system and teacher

25. 515 U.S. 819 (1995).

26. *Id.* at 829 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804–06 (1985)).

27. *Id.* (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993)).

28. *Perry*, 460 U.S. at 49.

29. *Id.*

30. *Id.*

31. *Id.* at 40–41.

mailboxes in the Perry Township schools"[32] by virtue of being the teachers' official representative. Arguably, being the sole official representative in light of local law[33] should entitle the representative to easy access to the represented individuals if only to facilitate efficient communication.

Yet, *Perry* was a little more complicated than the picture above suggests for two distinct reasons. First, prior to the PEA's election as the sole representative, both the PEA and the PLEA had represented some of the teachers and had had access to the mail system.[34] It was only after the election that the PEA negotiated a labor agreement specifying *inter alia* that it, among school employee organizations, would have sole access to the mail system.[35] To add insult to injury, some non-school-related organizations were accorded access to the same system.[36]

The *Perry* Court held that the forum at issue was not a general-purpose or even a limited-purpose public forum but was, instead, a nonpublic forum.[37] Because the "government property [was] not dedicated to open communication the government [could]—without further justification—restrict use to those who participate in the forum's

32. *Id.* at 39.

33. *See id.* at 40 (citing IND. CODE § 20-7.5-1-2(1) (1982)) ("PEA won the election and was certified as the exclusive representative, as provided by Indiana law.").

34. *See id.* at 39 ("Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the School District and apparently had equal access to the interschool mail system.").

35. *See id.* at 40; *see also* Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 303 (1997) (footnote omitted) ("PLEA, the rival union, was refused entrance to the teachers' boxes because its message was critical of the approved union and threatened that union's status quo and 'labor peace.' By excluding the speech of the rival union, the teachers' union gained the power to control reception of the truth, and the power to remind both insiders and outsiders that, as victor, it had the privilege of the audience."); Toni M. Massaro, Christian Legal Society v. Martinez*: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 607 n.144 (2011) (noting that the PEA "reserved more expressive power to reach their intended audience than did a rival union").

36. *See Perry*, 460 U.S. at 47 (noting that "the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities").

37. *Id.* at 53 (stating that "the internal mail system [was] not a public forum").

official business."[38] Ironically, the Court implied that it would have reached the same decision even if it had found the communications system a limited-purpose public forum; the Court noted:

> [E]ven if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.[39]

The Court's discussion is supposed to illustrate how limited-public-forum analysis should be applied. As a preliminary matter, such a forum may be limited by reference to the type of groups who are permitted to use it or to the types of content that are permitted to be included within the forum.[40] Yet, the Court's explanation was at the very least incomplete, if only because the Court failed to note that the PEA used this forum in addition to "the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students."[41] But then the question is whether the PEA represents one of the types of groups that is entitled to use the limited public forum. If so, then the PLEA should also have been included, because the PEA and the PLEA were of the same type of group and because both groups were "concerned with the terms and conditions of teacher employment."[42]

Suppose, instead, that the public forum was only open to groups like the Girl Scouts. Then, the question would be how to construe the

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38. *Id.* (footnote omitted).
39. *Id.* at 48.
40. *See id.* at 46 n.7.
41. *Id.* at 48.
42. *Id.*

PEA's having been granted permission to use that forum, notwithstanding that it was not of the appropriate type. At the very least, the *Perry* Court has created the potential for much constitutional mischief. Perhaps courts should consider who uses the forum to determine the limitations that have been placed on it. Or, perhaps courts should use a different criterion than who in fact uses the forum. After all, it may be that some of the organizations permitted to use the forum are of the correct type, but that others permitted to use it (as a favor) are not of the right type. The *Perry* Court's illustration of limited-public-forum analysis heavily increases the burdens on the courts, who may have great difficulty in determining whether an organization has been wrongly denied access because that organization was indeed of the correct type to use the limited forum, or whether instead an organization was permissibly denied access because it was of the wrong type, notwithstanding that a different organization of that same type had been afforded access.

Perry was not the first case in which the Court seemed to use forum doctrine in a somewhat facile manner. For example, in *Widmar v. Vincent*,[43] the Court examined whether the University of Missouri–Kansas City could exclude a religious group named Cornerstone from using university facilities.[44] The group had been permitted to use university facilities in the past but was told that it could no longer do so because of a regulation adopted by the Board of Curators that prohibited "the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'"[45]

When striking down the restriction, the Court explained that the University had "created a forum generally open for use by student groups."[46] "[Because it had] done so, the University . . . assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms."[47] The Court explained that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open

43. 454 U.S. 263 (1981).
44. *Id.* at 264–65.
45. *Id.* at 265.
46. *Id.* at 267.
47. *Id.*

to the public, even if it was not required to create the forum in the first place."[48] The relevant standard was a daunting one.

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[49] Basically, the Court reasoned that "UMKC [had] discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[50]

While analyzing the case as if the forum at issue was a general-purpose public forum, the *Widmar* Court itself recognized that this was incorrect, because the forum was instead a "limited public forum."[51] In what way was the forum limited? The forum was for student groups rather than for the public more generally.[52] But the question at hand was whether individuals could be excluded because of the content of their speech.[53] While speech cannot be limited because of content in a *general-purpose* public forum, there is a much different way to characterize what happened in this case. Limited public fora *can* involve content restrictions,[54] and one way to understand the UMKC restriction of the limited public forum was on the basis of content.[55]

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48. *Id.* at 267–68 (citing Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 175 & n.8 (1976)).

49. *Id.* at 269–70 (citing Carey v. Brown, 447 U.S. 455, 461, 464–65 (1980)).

50. *Id.* at 269.

51. *Id.* at 272.

52. *Id.* at 273 ("The University has opened its facilities for use by student groups . . . .").

53. *Id.* ("[T]he question is whether it can now exclude groups because of the content of their speech.").

54. *See* Massaro, *supra* note 35, at 615 ("Nor is it clear why the 'forum' in *Widmar*, was a 'public' one—as the case implies—and not a 'limited public forum'. . . .").

55. *See id.* ("[I]t is not obvious why excluding the topic of 'religion' is 'viewpoint' versus 'subject matter' discrimination."). If the exclusion of religion were subject matter rather than viewpoint based, then a more forgiving level of scrutiny would be employed. That said, however, the restriction at issue might not have passed muster even under the standard appropriate for a limited purpose public forum. *See infra* notes 56–60 and accompanying text.

Why would it make a difference? Restricting a limited public forum on the basis of content is subject to a reasonableness test rather than to "the most exacting scrutiny,"[56] and the former is a much more deferential standard.

Perhaps it would be thought that once the state has created a general purpose public forum for students, it cannot change the characterization and limit the public forum based on content. But that is incorrect. As the *Perry* Court later explained, "a State is not required to indefinitely retain the open character of the facility . . . ."[57]

A separate issue is whether the UMKC policy would have passed muster even had the forum been viewed as a public forum limited on the basis of content. The exclusion of Cornerstone might have been interpreted as viewpoint rather than content based, and viewpoint-based restrictions are prohibited even within limited-purpose fora.[58] In his *Widmar* concurrence in the judgment, Justice John Paul Stevens wrote: "If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted."[59] Viewpoint restrictions will not be upheld regardless of the forum's designation,[60] and thus the school's restriction might not have passed muster even had the Court recognized the permissibility of UMKC's imposing reasonable, content-based

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56. *Widmar*, 454 U.S. at 276.

57. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

58. *See Widmar*, 454 U.S. at 280 (Stevens, J., concurring in the judgment) ("But the university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted.").

59. *Id.* at 281; *see also* Healy v. James, 408 U.S. 169, 187–88 (1972) ("The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

60. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, *see* Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L.Ed.2d 770 (1974), or if he is not a member of the class of speakers for whose especial benefit the forum was created, *see Perry Education Ass'n.*, [460 U.S. 37 (1983)], the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

limitations in a limited public forum. But this means that the *Widmar* Court could have reached the same result without muddying forum jurisprudence.

B. Student Groups and Content-Based Restrictions

The Court's apparent difficulty in differentiating between content and viewpoint discrimination in *Widmar* was again evident when the Court decided *Rosenberger*. At issue was a university policy precluding the university from paying the printing costs of any student publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[61]

The *Rosenberger* majority interpreted the policy as imposing a viewpoint-based restriction.[62] Certainly, if the policy only precluded discussions that involved expression favoring the existence of God, then the university's restriction was viewpoint based. However, as Justice David Souter explained in his dissent, the regulation at issue "limit[ed] funding to activities promoting or manifesting a particular belief not only 'in' but 'about' a deity or ultimate reality, [therefore] it applie[d] to agnostics and atheists as well as it [did] to deists and theists."[63] But this means that the policy applied to all discussions of a particular kind of content, regardless of viewpoint.

The *Rosenberger* majority's response to Justice Souter's point was surprising. At first, the Court seemed to think that Justice Souter was simply noting that views both supporting and undermining religion would not receive funding. The Court then objected to the assumption that religious views are binary in nature: "The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech."[64] Then, the Court seemed to understand that Justice Souter's point was that a multiplicity of viewpoints had been barred from

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61. Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 823 (1995) (alteration in original).

62. *Id.* at 831 ("We conclude . . . that here . . . viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake.").

63. *Id.* at 895 (Souter, J., dissenting).

64. *Id.* at 831 (majority opinion).

the forum, although the Court was still not convinced that the ban was therefore content rather than viewpoint based: "The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways."[65]

The Court's construing the silencing of multiple voices as viewpoint discrimination would be understandable if, for example, four views on a particular topic had been excluded while two or three other views on that same topic had been permitted. But the University had precluded providing financial support for *any* view on particular topics,[66] and thus had simply limited the forum by excluding certain contents.

The difficulty with the *Rosenberger* analysis was that it suggested that removing *all* viewpoints on a particular topic was nonetheless viewpoint rather than content discrimination. Such an analysis suggests that a limitation on content will simply be interpreted as a limitation of multiple viewpoints and will then be subject to the kind of scrutiny reserved for viewpoint discrimination. Indeed, the Court rather confusingly characterized viewpoint discrimination as "an egregious form of content discrimination."[67]

The Court's suggestion that the difference between content and viewpoint discrimination is a matter of degree is especially unfortunate in a limited-public-forum analysis. As the *Rosenberger* Court itself explained, the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics."[68] The limitations will be upheld as long as they are reasonable, although the "State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'"[69] In contrast, in a limited public forum, the state is not permitted to "discriminate against speech on the basis of its viewpoint."[70] Characterizing the difference between

65. *Id.* at 831–32.

66. *See id.* at 896 (Souter, J., dissenting) (noting that the Guidelines "deny funding for the entire subject matter of religious apologetics").

67. *Id.* at 829 (majority opinion).

68. *Id.* at 829 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

69. *Id.* (quoting *Cornelius,* 473 U.S. at 804–06).

70. *Id.* (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993)).

content and viewpoint discrimination as a matter of degree in limited forum analysis is problematic, at least in part, because the difference in degree may well be a difference in kind—content discrimination in a limited public forum is often permissible, whereas viewpoint discrimination is rarely, if ever, permissible. To make matters worse, the Court makes it difficult to know when content discrimination will instead be treated as multiple-viewpoint discrimination.

Rosenberger is something of a conundrum for First Amendment law. It talks about the difference between content and viewpoint discrimination, but then seems to conflate the two.[71] As Justice Souter suggested in his dissent, the *Rosenberger* analysis "amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums."[72] Access will be expanded, because the *Rosenberger* analysis undermines states' ability to limit a forum on the basis of content, which means that more contents will have to be included in limited public fora, if only for fear that the desired content limitation would be characterized as viewpoint discrimination and struck down.

There are different ways to understand the *Rosenberger* analysis, especially because the case arose in the context of a university setting.

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71. *See id.* at 898 (Souter, J., dissenting) ("[T]he regulation is being applied . . . to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.").

72. *Id.* at 899. Some commentators seem not to appreciate the degree to which *Rosenberger* modifies the jurisprudence. For example, Professor Toni Massaro writes, "[i]f, for example, a public university sets up a program for student organizations to engage in speech, it may set the parameters of the program, define the participants, and otherwise set the conditions for participation. If the university satisfies the criteria above in crafting these conditions, then the program likely will be upheld." *See* Massaro, *supra* note 35, at 609. The relevant conditions were: "basic notions of procedural due process, a rational basis threshold of equal protection, and a thin, rational basis threshold of substantive due process." *See id.* at 608. But the University of Virginia seemed to meet these basic conditions, and its program was nonetheless struck down. Professor Massaro suggests that "the University denied the student staff of the publication their First Amendment rights, because it had promoted other student publications." *Id.* at 611. She then explained, "To deny only this publication University support, because of its religious perspective, was viewpoint discrimination." *Id.* However, such an explication of University policy does not give the University of Virginia sufficient credit.

The Court might implicitly have been challenging the reasonableness of limiting a university forum in such a way that discussions promoting or opposing religious points of view are excluded. According to this interpretation, which admittedly was *not* articulated by the Court, public universities by their very nature are open to vigorous and wide-ranging debate on a limitless number of subjects, so even non-viewpoint-based exclusions of discussions of religion cannot be justified.

Consider *Board of Regents of the University of Wisconsin System v. Southworth*,[73] which involved a challenge to how mandatory student activity fees were being used.[74] Some students objected to having their student fees fund student groups "that engage[d] in political and ideological expression offensive to [the students'] personal beliefs."[75]

The Court accepted that "the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive."[76] However, it was necessary to remember "the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."[77] The Court explained that the "speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds."[78] The Court rejected that it made sense to try to distinguish between purposes that were relevant to the forum and those that were not: "To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue."[79]

Here, the Court is suggesting that the university by its very nature should be open to all kinds of ideas. Thus, a university could "determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."[80] A university with such a mission is not barred by the Constitution from imposing "a mandatory fee to sustain an open dialogue

73. 529 U.S. 217 (2000).
74. *Id.* at 220–21.
75. *Id.* at 227.
76. *Id.* at 230.
77. *Id.* at 231.
78. *Id.* at 232.
79. *Id.*
80. *Id.* at 233.

to these ends."[81] The Court was not thereby affording the university a free hand with respect to how it structured its student group system. Some protection had to be provided for students' First Amendment rights.[82] That protection would be afforded as long as the university respected "the requirement of viewpoint neutrality in the allocation of funding support,"[83] as explained in *Rosenberger*.[84]

Yet, respecting viewpoint neutrality in the way required under *Rosenberger* may be more difficult than might first appear. If, indeed, *Rosenberger* erases or at least blurs the line between content and viewpoint discrimination, then it may well be that universities must steer clear of any content-based limitations on their student groups for fear that university limitations will be characterized as viewpoint-based and hence prohibited. If removing all viewpoints from a particular forum can simply be characterized as silencing a multiplicity of viewpoints and hence viewpoint-based discrimination,[85] then universities seeking to remove a topic from a forum may have some difficulty in assuring that their proposed content discrimination is evaluated in light of a reasonableness standard rather than the much more daunting standard reserved for viewpoint-based limitations. Further, if the University of Wisconsin's desire to promote discussion on an almost limitless number of issues was not something special about that university in particular but, instead, was a purpose that almost all universities share, then universities may have some trouble justifying content restrictions in their limited public fora, at least insofar as they wish to impose restrictions on student groups.

Rosenberger and *Southworth* together imply either that public universities may have some difficulty in meeting the reasonableness standard if they attempt to impose content-based restrictions on student clubs or, instead, that content restrictions in that context may be viewed

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81. *Id.*

82. *Id.* ("The University must provide some protection to its students' First Amendment interests . . . .").

83. *Id.*

84. *Id.* ("Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).") (parallel citation omitted).

85. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831–32 (1995).

as viewpoint restrictions and thus subjected to a very close scrutiny. A different issue requiring a different analysis involves the kinds of limitations, if any, that can be imposed on student clubs with respect to their membership rules.

III. ASSOCIATION LIMITATIONS

The right to association jurisprudence has involved several kinds of cases. Sometimes, the issue was relatively straightforward, e.g., when the state attempted to deny recognition to a group because of its viewpoint, and the Court has held that the right to association trumps the state's ability to engage in viewpoint discrimination.[86] However, other cases were much more difficult, both because the state had important interests at stake, including the eradication of invidiously discriminatory policies, and because there was a marked lack of evidence that implementing the state's nondiscrimination policy would force organizations to change their messages.[87] After deciding three cases involving organizations that discriminated on the basis of sex,[88] the Court seemed to have settled on a relatively clear standard in light of which to judge right of association claims.[89] But then the Court implicitly rejected the established jurisprudence while claiming to apply it, thereby muddying the right to association jurisprudence.[90] Up until *Martinez*, the right of association jurisprudence was in a state of flux.

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86. *See* Healy v. James, 408 U.S. 169 (1972) (striking down college president's refusal to recognize a chapter of Students for a Democratic Society).

87. N.Y. State Club Ass'n, v. City of New York, 487 U.S. 1 (1988) (upholding New York antidiscrimination law that aimed to limit private club exception to the law); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (holding that club was not the type of intimate and private association that warranted constitutional protection); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (declining to extend constitutional protection to club rules barring women, in part, because the club was large and lacked any other significant membership criteria).

88. *See* cases cited in *supra* note 87.

89. *See infra* notes 155–56 and accompanying text.

90. *See infra* notes 197–204 and accompanying text (discussing the ways that *Boy Scouts of America v. Dale* modified the existing jurisprudence while claiming to apply it).

A. Viewpoint Limitations on Association

The Court has discussed the right of association in numerous cases. Some of those cases were brought during periods of social unrest. For example, *Healy v. James*[91] involved a decision by the President of Central Connecticut State College to deny official recognition to a local chapter of Students for a Democratic Society.[92] The *Healy* Court noted some of the costs of being denied recognition: "Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings."[93]

The Court began its analysis by noting that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs,"[94] and explained that "denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[95] The important question involved determining what would count as an adequate justification. The *Healy* Court said in no uncertain terms that the state's disagreement with a group's viewpoint was an inadequate justification—the college "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[96] To justify the restriction, the President would have to do more than merely establish that the group had offensive views—he would have to show that the group was likely to impede the proper functioning of the school. Thus, "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[97]

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91. 408 U.S. 169 (1972).

92. *Id.* at 174 ("[T]he President . . . issued a statement indicating that petitioners' organization was not to be accorded the benefits of official campus recognition.").

93. *Id.* at 176.

94. *Id.* at 181.

95. *Id.*

96. *Id.* at 187–88.

97. *Id.* at 189.

Some of the themes discussed in *Rosenberger* and *Southworth* were foreshadowed in *Healy*. If colleges and universities should be devoted to the wide exchange of ideas and viewpoints, they certainly should not refuse recognition to student organizations merely because of a disagreement with the viewpoints expressed by those groups.

B. Nondiscrimination and Associational Rights

Several of the right of association cases did not involve college or university campuses. Instead, they involved organizations whose membership policies violated antidiscrimination laws. The implicated statutes were not designed to bring about a change in organizations' messages and, further, those whose membership policies were challenged had great difficulty in showing how their being more inclusive would change the messages that the groups wanted to impart.

One of the most important cases[98] balancing rights of association against other interests was *Roberts v. U.S. Jaycees*,[99] in which the Court addressed whether women could be precluded from being regular members of the Junior Chamber of Commerce.[100] The Jaycees argued that "requiring the organization to accept women as regular members . . . would violate the male members' constitutional rights of free speech and association."[101]

The *Roberts* Court discussed two different kinds of "freedom of association"[102] protected by the Constitution. "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[103] The Court explained that this kind of freedom of association

98. *See* Ashutosh Bhagwat, *Associations and Forums: Situating* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 543, 551 (2011) (discussing "the Court's two most important modern association cases, *Roberts v. United States Jaycees* and *Boy Scouts of America v. Dale*").

99. 468 U.S. 609 (1984).

100. *Id.* at 613 ("Regular membership is limited to young men between the ages of 18 and 35, while associate membership is available to individuals or groups ineligible for regular membership, principally women and older men.").

101. *Id.* at 615.

102. *Id.* at 617.

103. *Id.* at 617–18.

is protected "as a fundamental element of personal liberty."[104] Here, the Court was discussing family relationships, which "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[105] But if the protections triggered by this sort of association are limited to family-like associations, then a variety of relatively small groups based on identity or ideology will not be entitled to these kinds of protections.[106]

Yet, there is another kind of association that has also received protection, namely, "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[107] This kind of association is protected because it is "an indispensable means of preserving other individual liberties."[108] By linking all of these interests together, the *Roberts* Court suggests that they all should be examined in light of the same constitutional standard—state limitations on association affecting speech rights should be examined in light of the same standard as state limitations on association affecting the exercise of other First Amendment liberties.[109]

In *Roberts*, the question at hand was whether either of these kinds of constitutionally protected associational freedoms afforded protection to the Jaycees. The first kind of associational freedom

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104. *Id.* at 618.

105. *Id.* at 619–20.

106. *See* William P. Marshall, Smith, Christian Legal Society, *and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1950 (2011) ("[T]he right of association to foster self-identity has not been recognized outside the First Amendment context except in the instance of 'intimate association,' meaning deeply personal relationships such as family. Characterizing the religious organization's associational interest as identity-based is therefore to leave it constitutionally unprotected.").

107. *Roberts*, 468 U.S. at 618.

108. *Id.*

109. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 988–89 (2011) ("In *Roberts* and its progeny, however, the Court invoked the connection with free speech to *restrict* the right by rejecting constitutional protection for associations that are not predominantly expressive. With this move, the Court abandoned its original insight that association and assembly, while linked to free speech and press, are cognate, independent rights.").

discussed—the family-like association—was inapposite because "the local chapters of the Jaycees are large and basically unselective groups."[110] The only two disqualifying criteria were age and sex and, apart from those qualifications, "neither the national organization nor the local chapters employ any criteria for judging applicants for membership."[111]

That the Jaycees were large and relatively unselective did not mean that they should be precluded from using one of the two criteria—gender—actually employed. The Court did not try to understate the significance of what was at issue. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[112] Such forced inclusion "may impair the ability of the original members to express only those views that brought them together."[113] That said, however, the Court noted that the "right to associate for expressive purposes is not . . . absolute,"[114] and explained that limitations on the right of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[115]

Not only was the state law prohibiting sex-based discrimination viewpoint neutral,[116] but the Court was not convinced that prohibiting the Jaycees from barring women from regular membership would change the Jaycees' message.[117] Suppose, however, there had been evidence that inclusive policies would have substantially changed the Jaycees' message. The Court noted that the Minnesota law at issue "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing

110. *Roberts*, 468 U.S. at 621.

111. *Id.*

112. *Id.* at 623.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* ("On its face, the Minnesota Act . . . does not distinguish between prohibited and permitted activity on the basis of viewpoint . . . .").

117. *Id.* at 627 ("There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views.").

members."[118] That said, however, the Court was not saying that a showing of *any* change in view at all would have constitutional import. On the contrary, "even if enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."[119]

The Jaycees had worried that changing the membership policy might somehow result in a "change in the Jaycees' creed of promoting the interests of young men."[120] However, the Court was skeptical because the Jaycees seemed to rely "on unsupported generalizations about the relative interests and perspectives of men and women."[121] The Court explained that "[i]n the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."[122] Basically, the Court wanted evidence of actual change and was unwilling to defer to the Jaycees' claim that their message would be altered were their regular membership rules modified.

In her concurring opinion, Justice Sandra Day O'Connor offered a different reason why the Court's judgment should be upheld: she did not believe that "the Jaycees' right of association depends on the organization's making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.'"[123] She objected to the focus on the "requirement of proof of a membership-message connection,"[124] arguing instead that whether "an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."[125] In her view, the relevant test was whether the organization's focus was commercial,[126] and she offered a

118. *Id.*

119. *Id.* at 628.

120. *See id.* at 627.

121. *Id.* at 628.

122. *Id.*

123. *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment).

124. *Id.*

125. *Id.* at 633.

126. *Id.* at 634.

standard to determine whether an organization should be so characterized: "an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment."[127]

The Court was again forced to address the degree to which a state could interfere with membership policies in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[128] The Rotary's mission was to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."[129] Women were not permitted to become Rotary members,[130] although women could "attend meetings, give speeches, and receive awards."[131] The Rotary policy was challenged as a violation of the California's Civil Rights Act.[132]

The Court explained that "*Roberts* provides the framework for analyzing appellants' constitutional claims."[133] While "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships"[134] and the Constitution protects "the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities," [135] additional considerations must be taken into account when deciding whether the state is justified in forcing an organization to modify its membership policies.[136] As had been true of

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127. *Id.* at 635; *see also* Richard A. Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2010 CATO SUP. CT. REV. 105, 117 (2009–2010) ("For economic activities, the modern synthesis recognizes, without question, the dominance of the antidiscrimination laws over any claim of freedom of association.").

128. 481 U.S. 537 (1987).

129. *Id.* at 539 (quoting ROTARY MANUAL OF PROCEDURE 7 (1981)).

130. *Id.* at 541 ("Membership in Rotary Clubs is open only to men.").

131. *Id.*

132. *Id.* ("The complaint alleged, *inter alia,* that appellants' actions violated the Unruh Civil Rights Act, CAL. CIV. CODE [ ] § 51 (West 1982).").

133. *Id.* at 544.

134. *Id.*

135. *Id.*

136. *See infra* notes 137–38 and accompanying text (discussing the size of the organization).

the Jaycees organization in *Roberts*, "the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection."[137] Local Rotary Clubs might have hundreds of members,[138] and the Court expressly noted that there was "no upper limit on the membership of any local Rotary Club" and that "[a]bout [ten] percent of the membership of a typical club moves away or drops out during a typical year."[139]

While noting that Rotary members were "encouraged to invite business associates and competitors to meetings,"[140] the Court did not characterize the group as engaging primarily in commercial activities.[141] On the contrary, the Court described the clubs as engaging "in a variety of commendable service activities that are protected by the First Amendment,"[142] and spoke approvingly of the clubs' "basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace."[143] The Court suggested that permitting women to become members would not "require the clubs to abandon or alter any of these activities,"[144] although even if the required change "d[id] work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."[145]

New York State Club Ass'n v. City of New York[146] mirrored *Roberts* and *Rotary* in reasoning and result.[147] While the *New York* Court recognized that the "ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government,"[148] it nonetheless denied that "in

137. *Rotary Club of Duarte*, 481 U.S. at 546.

138. *See id.* ("The size of local Rotary Clubs ranges from fewer than 20 to more than 900.").

139. *Id.*

140. *Id.* at 547.

141. *Id.* at 548.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 549.

146. 487 U.S. 1 (1988).

147. *See id.* at 12.

148. *Id.* at 13.

every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution."[149] The Court noted that application of the local nondiscrimination law did "not require the clubs 'to abandon or alter' any activities that are protected by the First Amendment,"[150] although it did "prevent[] an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership."[151] Interestingly, in Justice O'Connor's concurring opinion in *New York*, she mentions her *Roberts* concurrence,[152] but nowhere suggests that the telling consideration in *New York* is the commercial/expressive distinction that she had previously emphasized.[153] Instead, she offered a different qualification this time, noting that "there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond."[154] If the application of a nondiscrimination law would substantially undermine an organization's expressive purposes, "[t]he associational rights of such organizations must be respected."[155]

In these cases, the Court's view seemed pretty consistent.[156] An organization's membership qualifications are subject to

149. *Id.* (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)).

150. *Id.* (citing *Rotary Club of Duarte,* 481 U.S. at 548).

151. *Id.*

152. *See id.* at 18 (O'Connor, J., concurring) ("The Court reaffirms the 'power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society.'") (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in judgment)).

153. Justice O'Connor merely notes that "[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law." *See id.* at 20 (O'Connor, J. concurring).

154. *N.Y. State Club Ass'n*, 487 U.S. at 19 (O'Connor, J., concurring).

155. *Id.*

156. *See generally N.Y. State Club Ass'n*, 487 U.S. 1 (upholding New York antidiscrimination law that aimed to limit private club exception to the law); *Rotary Club of Duarte*, 481 U.S. 537 (holding that club was not the type of intimate and private association that warranted constitutional protection); *Roberts*, 468 U.S. 609

antidiscrimination norms unless the organization's message would be substantially modified because of the forced inclusion of undesired members.[157] However, that relatively robust requirement of substantial message modification was relaxed in a different kind of association case.

C. A Lesbian, Gay, Bisexual, Transsexual Exception?

Before the relaxed associational analysis is discussed, it is helpful to consider a case that combined elements of speech and association. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[158] the Court addressed whether the State of Massachusetts could require parade organizers to permit a group of gay, lesbian, and bisexual descendants of Irish immigrants (GLIB) to march in a St. Patrick's Day Parade "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."[159] The Court understood the parade to involve "marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[160]

The Court admitted that the collective point was not readily discernible, because the parade organizers were "rather lenient in admitting participants,"[161] and the "multifarious voices"[162] made it somewhat difficult "to isolate an exact message as the exclusive subject matter of the speech."[163] Lack of discernible message notwithstanding, the parade organizers were quite clear in their desire to prevent GLIB from marching in the parade behind a banner identifying that group.[164]

(declining to extend constitutional protection to club rules barring women, in part, because the club was large and lacked any other significant membership criteria).

157. *See N.Y. State Club Ass'n*, 487 U.S. at 19.

158. 515 U.S. 557 (1995).

159. *Id.* at 561.

160. *Id.* at 568.

161. *Id.* at 569.

162. *Id.*

163. *Id.* at 569–70.

164. *Id.* at 574.

The parade organizers explained that they were not excluding marchers on the basis of sexual orientation.[165] Rather, the organizers objected to including the gay, lesbian, and bisexual group "as its own parade unit carrying its own banner."[166] What would be communicated by such a group carrying such a banner? The Court suggested that the message disfavored by the organizers was "not difficult to identify,"[167] because a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.[168]

The Court then explained that "[t]he parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade."[169] Regardless of which message was disfavored, it is "the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[170] The Court explained that the government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[171]

Hurley involved paradigmatic First Amendment expression,[172] and is perhaps better read as a free speech case than an association case,

165. *Id.* at 572 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march.").

166. *Id.*

167. *Id.* at 574.

168. *Id.*

169. *Id.* at 574–75.

170. *Id.* at 575.

171. *Id.* at 579.

172. *Id.* at 568 ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.").

although it might be read as both.[173] In any event, *Roberts*, *Rotary*, *New York*, and *Hurley* were all cited in *Boy Scouts of America v. Dale*,[174] a case that misapplied the established right to association jurisprudence.

At issue in *Dale* was the Boy Scouts' decision to revoke the adult membership of James Dale after a newspaper published a picture of him that identified him as the co-president of the Lesbian/Gay Alliance at Rutgers University.[175] When he asked for an explanation of the membership revocation, he was told "by letter that the Boy Scouts 'specifically forbid membership to homosexuals.'"[176]

The *Dale* Court sought to situate the issue in light of the prevailing jurisprudence. For example, the Court recognized that it had explained in *Roberts* that the right to associate "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas,"[177] and in *New York* that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[178] Nonetheless, the *Dale* Court affirmed that "the freedom of expressive association, like many freedoms, is not absolute."[179]

One of the issues addressed by the Court was "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[180] The Scouts had claimed that "homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms 'morally straight'

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173. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. ___, ___,130 S. Ct. 2971, 2986 n.14 (2010) (leaving open "[w]hether *Hurley* is best conceptualized as a speech or association case (or both)").

174. 530 U.S. 640 (2000).

175. *Id.* at 645.

176. *Id.*

177. *Id.* at 647–48 (discussing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

178. *Id.* at 648 (citing N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)).

179. *Id.*

180. *Id.* at 650.

and 'clean.'"[181] The Court noted both that "the Scout Oath and Law do not expressly mention sexuality or sexual orientation,"[182] and that "the terms 'morally straight' and 'clean' are by no means self-defining."[183] However, the Boy Scouts asserted that they believe that "homosexual conduct is not morally straight,"[184] and that they did "not want to promote homosexual conduct as a legitimate form of behavior."[185] That was enough for the Court: "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."[186]

Perhaps because the Court thought that others might not be convinced that the Boy Scouts' assertions to the Court reflected their public position, the Court offered more proof of the Scouts' policy.[187] For example, the Court cited a "1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive."[188] That statement "expresse[d] the Boy Scouts' 'official position' with regard to 'homosexuality and Scouting.'"[189] Yet, if this represented the Boy Scouts' public position, one would have expected that it would be disseminated not merely to the Executive Committee but to the public more generally. As Justice Stevens pointed out in his dissent, however, that policy position was not publicly disseminated.[190]

What was the official policy? Price explained that that the Boy Scouts "do not believe that homosexuality and leadership in Scouting are appropriate."[191] But that is not the equivalent of saying that homosexual conduct is not morally straight. For example, one might believe that sexual conduct is quite appropriate for certain people (e.g., members of a church) but not for others (e.g., priests). Were that the Boy Scouts'

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 651.
185. *Id.*
186. *Id.*
187. *See id.* (stating "we look to the [written evidence] as instructive, if only on the question of the sincerity of the professes beliefs").
188. *Id.*
189. *Id.*
190. *See id.* at 672 (Stevens, J., dissenting).
191. *Id.* at 652 (majority opinion).

position, it would be false to claim that they had a general attitude about same-sex relations. True, it would not have helped Dale insofar as the group claimed to believe a same-sex orientation was incompatible with having a leadership position. However, the mere assertion that homosexuality and leadership in scouting are incompatible would presumably not suffice,[192] as the Court did not give deference to similar claims of association in *Roberts*, *Rotary*, and *New York*, all of which asserted that being female was somehow incompatible with the demands of general membership.

To make matters even more complicated, while the Boy Scouts' position was that an individual with a same-sex orientation would not "be employed by the Boy Scouts of America as a professional or non-professional,"[193] that position did have an exception, namely, if there was "any law to the contrary."[194] This qualification undercuts the Boy Scouts' legal stance in two respects. First, the announced policy seems to involve deference to local law, which suggests that internal policy *permitted* Dale to have a leadership position in New Jersey, where orientation discrimination violated the law.[195] Second, the general refusal to employ individuals with a same-sex orientation suggests that the Boy Scouts did not have any reason to believe having a same-sex orientation somehow disqualified an individual for a leadership position in particular. Rather, the official position was that the Boy Scouts did not want someone with a same-sex orientation to be connected to the organization in any capacity, regardless of that person's skills and abilities.[196]

The Court offered additional evidence of the Boy Scouts' disapproval of same-sex relations, noting some of the Boy Scouts' "assertions in prior litigation."[197] Needless to say, this is hardly the kind of dissemination that one might expect if the Boy Scouts were trying to impart a particular message to scouts in particular or to the public more

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192. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

193. *Dale*, 530 U.S. at 671 (Stevens, J., dissenting).

194. *See id.* at 672.

195. *See* N.J. STAT. ANN. § 10:5-12 (West 2012).

196. *See Dale*, 530 U.S. at 674 (Stevens, J., dissenting) (citing the Boy Scouts' position that "homosexuals do not provide a desirable role model for Scouts").

197. *See id.* at 652 (majority opinion).

generally. The arguments used in a litigation stance might not be communicated to anyone at all not directly connected to the litigation.

The *Dale* Court reflected the past jurisprudence when denying that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[198] Otherwise, the Court would have decided *Roberts*, *Rotary*, and *New York* differently, and would not even have attempted to evaluate whether permitting women to be members would somehow change the message of the respective organizations. But after denying that expressive associations can erect a shield, the Court seemed to allow the Boy Scouts to do exactly that.

One difficulty posed in *Dale* was that the articulated reason for the firing was Dale's orientation *rather than* his political activities. But this means that the Boy Scouts were claiming that an individual could be fired even if he were not known publicly to have a same-sex orientation—the Scouts seemed to be arguing that employing such a person would somehow impair the Boy Scouts' ability to deliver their desired message. But accepting that a person can be fired if he has a same-sex orientation is in effect recognizing a particular kind of shield to antidiscrimination laws, which is precisely what the Court had consistently rejected in the previous case law.[199]

Rather than reconcile the previous decisions with *Dale*, the Court ignored the stated reason for Dale's dismissal—his same-sex orientation—and instead shifted the focus to some facts about Dale: "Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.'"[200] The Court then claimed that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts [Association] accepts homosexual conduct as a legitimate form of behavior."[201]

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198. *Id.* at 653.

199. *See id.* at 679 (Stevens, J., dissenting) ("[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law.").

200. *Id.* at 653 (majority opinion).

201. *Id.*

This is surprising. One might wonder why Dale's very presence rather than, for instance, activist comments that he might make,[202] would force the Boy Scouts to endorse same-sex conduct as legitimate. The *Dale* Court cited *Hurley* in support, explaining that "the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."[203] But the stated reason of the Boy Scouts was not that Dale was going to be holding some sort of sign, expressing certain prohibited views, or engaging in particular conduct.[204] Rather, it was because of his orientation.[205]

All scoutmasters were told that if they were asked about sexual matters, the scoutmasters should refer the scouts elsewhere,[206] and there was no reason to think that Dale was going to use his position to promulgate a message that undermined the Boy Scouts' views. Ironically, the *Dale* Court claimed to be following *Hurley*,[207] but was in reality turning *Hurley* on its head.

If, indeed, Dale was being rejected because of the particular message he was or would be expressing, then his firing would have no implications for someone else who, for example, was not featured in a

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202. *See* Bhagwat, *supra* note 109, at 1001 ("[I]t is not at all clear why Dale's mere presence as an assistant leader would interfere with the Scouts' ability to communicate a message of hostility to homosexuality, unless Dale himself used his position as a bully pulpit to defend homosexuality."). Nonetheless, Professor Bhagwat believes that *Dale* was rightly decided, albeit for the wrong reasons. *See* Bhagwat, *supra* note 98, at 554 ("[T]he Court's decision in *Boy Scouts of America v. Dale*—upholding the Boys Scouts' right to discriminate in the selection of their leadership was probably correct, no matter how lacking the Court's reasoning.").

203. *Dale*, 530 U.S. at 653 (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. Of Boston, 515 U.S. 557, 574–75 (1995)).

204. *Id.* at 694–95 (Stevens, J., dissenting) ("Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message.").

205. *Id.* at 676 (Stevens, J., dissenting) ("[W]hen Dale was expelled from the Boy Scouts, BSA said it did so because of his sexual orientation, not because of his sexual conduct.").

206. *See id.* at 669 (Stevens, J., dissenting) ("Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: 'Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.'") (citing BOY SCOUT HANDBOOK (1992)) .

207. *See id.* at 653–61 (majority opinion) (citing *Hurley* for support in each step of the legal analysis).

local newspaper supporting gay rights. But it does not seem plausible to believe that the Boy Scouts were really firing Dale for any message that he had or would likely assert, because there was no evidence in the record that Dale had ever asserted a position to the scouts that undermined any position that the Boy Scouts wished to promulgate.[208] Further, the very position paper cited to prove the Boy Scouts' policy, which announced that a same-sex orientation was incompatible with leadership, made clear that orientation per se was the target rather than, e.g., the comments that a leader might make to scouts.[209]

A separate issue involved what Dale or anyone else might say outside of the scouting context. But even here the Boy Scouts' claim about message control was unpersuasive, because the Boy Scouts admitted that someone with a different-sex orientation who supported gay rights outside of the scouting context would not be fired for expressing such opinions.[210] Presumably, then, had Dale been President of a Gay-Straight Alliance at Rutgers, he could have continued to be a Scout leader as long as he self-identified as having a different-sex orientation. But this makes even clearer that the Boy Scouts were targeting orientation rather than trying to exert message control.[211]

The *Dale* Court wrote that an "association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[212] But such a position contradicts both the past case law and other parts of the *Dale* opinion itself—the test is not whether there is a possibility that the message could be changed at all in order for the

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208. *See id.* at 689 (Stevens, J., dissenting) ("BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked.").

209. *See id.* at 672 (Stevens, J., dissenting) (noting the Boy Scouts of America position that "homosexuality and professional or non-professional employment in Scouting are not appropriate").

210. *See id.* at 691 n.19 (Stevens, J., dissenting).

211. *Cf.* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1938 (2006) ("[A] religious group (say, a Catholic group) that condemns homosexuality might demand that its members share those views. ... And if the group tolerates these dissenting heterosexual Catholics but excludes dissenting homosexual Catholics, then it would be engaging in prohibited sexual orientation discrimination, not permitted religious discrimination.") (emphasis omitted).

212. *Dale*, 530 U.S. at 655 (majority opinion).

organization to be protected. Rather, there has to be actual change that is significant.[213]

Dale modifies right to association jurisprudence while claiming to follow it. The *Dale* Court deferred to the organization about whether forcing the organization to open up its membership would modify the organization's message.[214] Further, the Court seemed to ignore that the relevant standard was not whether the group's message might incrementally be changed but whether, instead, application of an antidiscrimination law would *significantly* affect the message.[215]

Ironically, in a different case concerning deference to an organization's views about speech, the Court gave short shrift to claims that state action would modify a message in undesired ways. At issue in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*[216] was the Solomon Amendment, which provided that "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[217] The law was challenged by a group of law schools and law faculties,[218] who wished to "restrict military recruiting on their campuses because they object to the policy Congress has adopted with

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213. *See id.* at 648 (discussing protection that would be accorded if a person significantly affected the group's ability to communicate). *See also* Bd. of Dirs. of Rotary, Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (noting that a slight change in message would not suffice to require no change in membership); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (noting that incidental change in message would not trigger the associational protection).

214. *See Dale*, 530 U.S. at 685–86 (Stevens, J., dissenting) ("[T]he majority insists that we must 'give deference to an association's assertions regarding the nature of its expression' and 'we must also give deference to an association's view of what would impair its expression.' . . . This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further."); *see also* Bhagwat, *supra* note 109, at 989 (stating that "the Court deferred to the Boy Scouts' assertions that the organization was in fact hostile to homosexuality and that Dale's inclusion would interfere with its ability to convey that message").

215. *See Dale,* 530 U.S. at 686 (Stevens, J., dissenting).

216. 547 U.S. 47 (2006).

217. *Id.* at 51 (citing 10 U.S.C. § 983 (2000 ed. & Supp. IV)).

218. *Id.* at 52 ("Respondent Forum for Academic and Institutional Rights, Inc. (FAIR), is an association of law schools and law faculties.").

respect to homosexuals in the military."[219] Basically, the Solomon Amendment forced universities to choose between honoring their nondiscrimination policies (which required that employers who discriminated on certain bases would not be afforded university access for interviewing prospective employees) and receiving federal funds.[220]

FAIR argued that the Solomon Amendment "violated the law schools' First Amendment freedoms of speech and association,"[221] because the military would have to be afforded favored employer status even if its employment policy was not in accord with the law school's nondiscrimination policy.[222] Thus, for example, it would not suffice for a law school to treat the military as it treated other employers who did not meet the relevant policy.[223] Instead, the university would have to treat this potential employer as if it followed the school's nondiscrimination policy when it was obvious that the employer did not. But a school selectively enforcing a nondiscrimination policy may send the undesired message that the school is not serious about that policy.

The Court did not defer to the law schools about whether their speech would be modified by permitting the military recruiters on campus, noting that the "Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."[224] While the Court recognized that many "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say,"[225] the Court reasoned that the "Solomon

219. *Id.*

220. *See id.*

221. *Id.* at 53.

222. *See id.* at 55 ("In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.").

223. *See id.* at 56 (rejecting a reading according to which "a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy").

224. *Id.* at 60.

225. *Id.* at 61.

Amendment does not require any similar expression by law schools."[226] For example, there was "nothing in this case approaching a Government-mandated pledge or motto that the school must endorse."[227] Of course, New Jersey was not requiring the Boy Scouts to pledge or endorse anything, and the Court was nonetheless willing to defer to the Boy Scouts that its message would be altered were it forced to do what it did not want to do.

The *Rumsfeld* Court also addressed whether the government was violating right-to-association guarantees through the Solomon Amendment. The Court noted that it had recognized limitations on "the government's ability to force one speaker to host or accommodate another speaker's message."[228] However, the Court distinguished what was before it from other cases by noting that the "compelled-speech violation in each of [its] prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[229] In contrast, in this case, "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[230]

The law schools objected, because "if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do."[231] The Court disagreed on substantive grounds, explaining that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[232]

The Court's response is interesting for two distinct reasons. First, the Court refused to defer with respect to the content of the communicated message. "The law schools *say* that allowing military

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226. *Id.*

227. *Id.* at 62.

228. *Id.* at 63 (citing Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 566 (1995)).

229. *Id.*

230. *Id.* at 64.

231. *Id.* at 64–65.

232. *Id.* at 65.

recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but . . . a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'"[233] Second, not only was the Court unwilling to defer with respect to what permitting access would mean, but the Court went further. It *announced* what permitting military recruiters on campus would not mean by denying that permitting access would send a message of acquiescence, if not endorsement of military policy, notwithstanding all of the difficulties associated with offering an authoritative construction of a message or symbol.[234] Using this reasoning, the *Dale* Court should simply have explained to the Boy Scouts that New Jersey's precluding them from firing Dale did not imply that the Boy Scouts agreed with New Jersey's policy.

There were at least two ways to view *Rumsfeld.* It might be viewed as falling into the *Dale* line of cases where the Court interprets the existing jurisprudence in a way that adversely impacts the LGBT community.[235] Or, it might be viewed as returning to the past jurisprudence where the Court will not simply defer to an organization's claims about the message communicated by the organization doing something that it does not want to do. Or, perhaps, the case might be viewed as doing both. In any event, the *Rumsfeld* Court's unwillingness to defer to an organization about whether the organization's doing something would likely result in a modification of the organization's message was repeated in *Martinez.*

IV. *MARTINEZ*

The Court's *Martinez* decision has been criticized for a variety of reasons. Some have suggested that the Court turned a blind eye to efforts

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233. *Id.* at 69 (citing Boy Scouts of America v. Dale, 530 U.S. 640, 653 (2000)).

234. *Cf.* Pleasant Grove City v. Summum, 555 U.S. 460, 476 (2009) ("[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure . . . .").

235. For example, *Bowers v. Hardwick*, 478 U.S. 186 (1986), might be viewed as modifying the jurisprudence in a way that was disadvantageous to the LGBT community. As the Court recognized in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), "*Bowers* was not correct when it was decided, and it is not correct today."

by the Hastings College of the Law to target a particular student group.[236] Others have suggested that the Court wrongly conflated different lines of First Amendment jurisprudence and thereby arrived at an indefensible result.[237] But someone examining the facts and holding of the case in light of the different lines of First Amendment jurisprudence should instead see a measured response designed to bring a little order to a jurisprudence that has been in serious disarray in a number of respects. Contrary to the assertions of a variety of commentators,[238] *Martinez* is a welcome step in the direction of First Amendment coherence.

A. The Setting

At issue in *Martinez* was whether the Hastings College of the Law could require all organizations receiving a special status in the school to have an open-door policy so that any student could join any student organization.[239] The policy was challenged by a campus religious group wishing to prevent individuals from becoming members if they did not share the group's beliefs.[240] A closely divided Court upheld the policy.[241]

The Hastings policy implicated several constitutional issues. First, if it could be shown that the adoption of the policy was pretextual and that the school was adversely targeting a group because of its viewpoint, then it would be very difficult, if not impossible, to uphold the constitutionality of the policy. Even if the policy were not thought to

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236. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. ___, ___, 130 S. Ct. 2971, 3017 (2010) (Alito, J., dissenting) ("CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy.").

237. *See, e.g.*, Cooley, *supra* note 2, at 769 ("The major flaw in the majority's argument is that it conflates CLS's free speech and expressive association claims.").

238. *See generally* Jack Willems, Recent Development, *The Loss of Freedom of Association in* Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010), 34 HARV. J.L. & PUB. POL'Y 805 (2011) (criticizing the opinion); Bhagwat, *supra* note 98 (same).

239. *Martinez*, 130 S. Ct. at 2978.

240. *See id.* at 2980.

241. *See id.* at 2982.

involve viewpoint discrimination, it still would have to be examined under the applicable association and speech jurisprudence. Further, because this is a university setting, additional hurdles might have to be overcome if, for example, the university had attempted to impose a content-based restriction on a student group. Thus, *Martinez* had the potential to be decided in several different ways on a number of different bases.

B. Viewpoint Discrimination

One issue that divided members of the Court was whether CLS had been picked out for adverse treatment or whether, instead, the school was administering its non-exclusionary policy in an even-handed way. CLS argued that the school's adoption of the policy was pretextual,[242] and Justice Samuel Alito in dissent lent credence to that claim.[243] Were the Court to have accepted the accuracy of that charge, the analysis would have been straightforward. In that event, as Justice Alito suggested, *Healy* would control,[244] and the Court would almost certainly have struck down the policy. As the *Healy* Court explained, "[t]he College . . . may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[245]

Rather than accept the accuracy of the viewpoint discrimination claim, the Court remanded the case for consideration of the pretext argument.[246] Remand notwithstanding, however, the Court itself expressed a view about whether the school was in fact engaging in viewpoint discrimination. The *Martinez* Court suggested that the

242. *See id.* at 2995.

243. *Id.* at 3017 (Alito, J., dissenting) ("CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy.").

244. *Id.* at 3009 (Alito, J., dissenting) ("I think that *Healy* is largely controlling.").

245. Healy v. James, 408 U.S. 169, 187–88 (1972).

246. *Martinez*, 130 S. Ct. at 2995 ("On remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is preserved."). *See also* Epstein, *supra* note 127, at 106 (noting that there was a remand "to see if CLS could still pursue its claim that Hastings had used its all-comers policy as a pretext for impermissible viewpoint discrimination").

religious group was not being discriminated against but, instead, was seeking special treatment.[247] The majority rejected that *Healy* controlled precisely because the majority did not believe that Hastings was guilty of viewpoint discrimination.[248]

C. Hastings and the Right to Association

The *Martinez* Court framed the issue before it as whether the Constitution permits "a public law school [to] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students."[249] The student group had particular views about the conditions under which sexual relations should take place ("sexual activity should not occur outside of marriage between a man and a woman"[250]) and excluded anyone who engaged in "unrepentant homosexual conduct."[251] The group also barred anyone from being a member who did not share the group's religious convictions.[252]

CLS suggested that the school's policy impaired the group's expression and association rights "by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do

247. *See Martinez*, 130 S. Ct. at 2978 ("CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy."). Here, the Court employs an approach against a religious group that religious groups have sometimes used when seeking to justify the denial of rights to members of the lesbian, gay, bisexual, transgender (LGBT) community. *Cf.* Romer v. Evans, 517 U.S. 620, 626 (1996) (discussing the claim that Amendment 2 "does no more than deny homosexuals special rights").

248. *See Martinez*, 130 S. Ct. at 2987 n.15 ("Hastings' all-comers policy is paradigmatically viewpoint neutral. The dissent's contention that 'the identity of the student group' is the only 'way of distinguishing *Healy*,' is thus untenable.") (citing *id.* at 3008 (Alito, J., dissenting)).

249. *Id.* at 2978 (majority opinion).

250. *Id.* at 2980.

251. *Id.* at 2980. The Seventh Circuit Court of Appeals has suggested that CLS also bars anyone who engages in unrepentant, nonmarital, heterosexual conduct. *See* Christian Legal Soc'y v. Walker, 453 F.3d 853, 860 (7th Cir. 2006) ("Those who engage in sexual conduct outside of a traditional marriage are not invited to become CLS members unless they repent the conduct and affirm the statement of faith.").

252. *Martinez*, 130 S. Ct. at 2980.

not share the organization's core beliefs about religion and sexual orientation."[253] Thus, the group feared that its core message might be changed if it were prevented from limiting membership to those with the "correct" views.[254] But whether the group's message would in fact be changed by relaxing its membership rules is an empirical matter[255] that would presumably depend upon whether students who did not share the organization's views would in fact become members and, if so, how many.[256] As the Court made clear in most of the association cases, the inability to exclude might not affect the message at all, much less significantly.[257]

Some commentators do not seem to appreciate that the mere possibility of dissenting views does not somehow change a core message.[258] Presumably, rather than simply choosing to disband, groups

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253. *Id.* at 2978.

254. *See* Willems, *supra* note 238 at 805 ("[A]n organization that cannot control its membership cannot control its message.").

255. *See* Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 510 (2011) (suggesting that "such fears of hijacking are exaggerated").

256. *See Martinez*, 130 S. Ct. at 2992 ("Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs."). *See also* Blake Lawrence, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with* Christian Legal Society v. Martinez, 39 HASTINGS CONST. L.Q. 629, 654–55 (2012) ("[T]he likelihood of a student making the conscious effort to be voted into leadership of an organization only to kill it are next to nil."); William E. Thro & Charles J. Russo, Commentary, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 ED. LAW REP. 473, 475 (2010) (noting that "no non–Christian, gay, lesbian, or bisexual students [had] sought to join the organization or attend its meetings").

257. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988) (rejecting that the forced inclusion would result in a change of message); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (same); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (same).

258. *See* Willems, *supra* note 238, at 815 ("If the right to exclude is constitutionally guaranteed in cases where an organization's ability to convey its message depends on such a right, it is difficult to see how the Court was able to conclude that the law school's policy did not endanger CLS's right to expressive association."). *See also* Bhagwat, *supra* note 98, at 554 ("Without the ability to select its own members, associations of citizens cannot effectively formulate, identify, and communicate their views on cultural and political questions . . .").

precluded from discriminating should choose to wait and see whether the modification in membership rules would result in a change of message.[259] Indeed, with the exception of *Dale*, the whole right of association jurisprudence has focused on whether the organization's message had in fact been changed significantly rather than on whether the group believed that its message might be changed.[260]

Suppose that the CLS prediction about message change later proved to be correct. The *Martinez* Court noted that were that to happen, the school administration could take appropriate steps to prevent that from occurring in the future, for example, by changing the all-comers policy: "If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy."[261] But this suggests that the Court was not attempting to bring about a message change indirectly,[262] but instead was permitting the state to enforce antidiscrimination norms absent a showing of actual message modification.

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259. Some commentators seem not to appreciate this. *See* Thro & Russo, *supra* note 256, at 485 ("[S]ince some groups will decide that the 'costs' of compromising their message are greater than the 'benefits' of accessing limited public fora, they will forgo participation.").

260. *See N.Y. State Club Ass'n*, 487 U.S. at 13 ("If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership."); *Rotary Club of Duarte*, 481 U.S. at 548 (noting that the Unruh Act "does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace"); *Roberts*, 468 U.S. at 628 ("In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.").

261. *Martinez*, 130 S. Ct. at 2993.

262. Some commentators seem not to appreciate this. *See* Thro & Russo, *supra* note 256, at 488–89 ("Yet, while the decision does not permit a *direct* ban, it does permit an *indirect* ban on the offensive speech. If an organization expresses a belief that is offensive to a segment of society, then the government may force the group to dilute its message or abandon use of government property and communication channels. Thus, the government accomplishes indirectly what the First Amendment prohibits it from doing directly.").

While admitting that "the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints,"[263] the Court noted that an "all-comers condition on access to RSO status . . . is textbook viewpoint neutral."[264] That said, however, the school policy did entail that certain students were eligible to become members of the group who would not otherwise be eligible.

All student groups faced the same danger—students would be permitted to join any student group,[265] notwithstanding the joining students' disagreement with the groups' beliefs and goals.[266] Basically, all organizations were asked to "choose between welcoming all students"[267] on the one hand or "forgoing the benefits of official recognition" on the other.[268] For example, Hastings Outlaw, a student group dedicated to combating orientation discrimination,[269] would have to admit students as members, even if those students wished to proclaim the sinfulness of having sexual relations outside of a marriage composed of one man and one woman.

The *Martinez* Court pointed out that student clubs had neutral means to help decrease the likelihood that individuals would try to hijack the clubs. For example, a student group might "condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise."[270] Basically, not only was there no showing of actual message change, but the student

263. *Martinez*, 130 S. Ct. at 2978 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972)).

264. *Id.* at 2993.

265. *See* Epstein, *supra* note 126, at 112 ("The all-comers policy requires all individuals to be admitted into all groups.").

266. *See* Brownstein & Amar, *supra* note 255, at 519 ("The 'all-comers' policy disadvantages all expressive associations in essentially the same way. There is no convincing argument that it directly distorts debate in a way that disfavors some ideas or the groups that espouse them more than others.").

267. *Martinez*, 130 S. Ct. at 2978.

268. *Id.*

269. *See id.* at 2981 n.4.

270. *Id.* at 2992.

groups had neutral means by which to help assure the integrity of the student clubs.

How does the open-membership requirement fare in light of the past right to association jurisprudence? That depends upon which cases one considers. In the *Roberts-Rotary-New York* line of cases, the Court held that the Constitution did not prevent the states from enforcing antidiscrimination norms where the objecting organization could not provide evidence that a significant change in message had or would thereby result.[271] So, too, the *Rumsfeld* Court rejected that the state was precluded from forcing organizations to change their association policies merely because those organizations feared that the forced association would change their message.[272] In contrast, the *Dale* Court was rather deferential to organization claims regarding the possibility of message change.[273] Most of the right to association cases supported the *Martinez* approach,[274] although the *Dale* majority would presumably have found in favor of CLS.[275]

One legal issue that might be important to resolve involves the level of scrutiny being employed in the right of association cases. Both *Rotary* and *New York* followed *Roberts*,[276] so an analysis of the *Roberts* rationale may be the most instructive. The *Roberts* Court offered a standard for determining when the state was permitted to require an organization to modify its membership criteria, explaining that infringement on the right to associate "may be justified by regulations

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271. *See supra* notes 73–139 and accompanying text (discussing the three cases).

272. *See infra* note 326 and accompanying text (rejecting that the mere assertion that an organization's message would change because of a forced association suffices for constitutional purposes).

273. *See supra* notes 173–213 and accompanying text (discussing the holding of Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

274. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 64 (2004) (finding that law school message would not be changed by allowing military recruiters on campus); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1998) (precluding discrimination absent a great showing of actual message change); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (same); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (same).

275. *See Dale*, 530 U.S. at 651 (deferring to the Boy Scouts with respect to whether admitting gays was incompatible with their mission).

276. *See N.Y. State Club Ass'n*, 487 U.S. at 11–12; *Rotary Club of Duarte*, 481 U.S. at 544–45.

adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[277]

The compelling state interests mentioned in *Roberts* are normally associated with strict scrutiny, although the description of the required means—the chosen means may be considered acceptable as long as there are no significantly less restrictive means that also would have brought about the same result—suggests a lower level of scrutiny.[278] Commentators cannot seem to agree about what level of scrutiny is being employed in *Roberts*, *Rotary*, and *New York*, although these all involve limitations on expressive association.[279] Whatever the level of scrutiny actually being employed, the Court suggested in all of these cases that the nondiscrimination norm could be enforced because of the lack of a showing of a significant change in message.[280]

Martinez follows the *Roberts-Rotary-New York* line of cases in reasoning and result—application of an antidiscrimination norm was permissible absent a showing of significant message alteration. Various similarities between *Martinez* and these cases should be noted. For example, one of the considerations that militated in favor of requiring the Rotary Club to open up its membership was that on average there was a ten percent turnover in membership each year.[281] By the same token, CLS would presumably average an even higher annual turnover rate if

277. *Roberts*, 468 U.S. at 623.

278. *See id.*

279. *Compare* Christian A. Malanga, Note, *Expressive Association–Student Organizations' Right to Discriminate: A Look at Public Law Schools' Nondiscrimination Policies and Their Application to Christian Legal Society Student Chapters*, 29 W. NEW ENG. L. REV. 757, 780 n.183 (2007) (noting that *Roberts* used strict scrutiny), *and* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 631, 656 (2011) (discussing the *Roberts* Court's use of "the heightened scrutiny associated with expressive association"), *with* Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of* Stropnicky v. Nathanson, 35 SAN DIEGO L. REV. 1, 15 (1998) (noting the "traditional low-level of scrutiny to regulations that may infringe on freedom of association" after discussing *Roberts*, *Rotary* and *New York*).

280. *See supra* notes 274–75 and accompanying text.

281. *See Rotary Club of Duarte*, 481 U.S. at 546.

only because of the number graduating each year, given that students tend to spend only three years in law school.[282]

The CLS meetings were open to all students.[283] Just as it was not clear that affording regular membership to women would change the Jaycees' or Rotarians' messages when women could already attend meetings,[284] it was not at all clear that permitting individuals to become members of CLS regardless of their sexual orientation or religious belief would change the message of CLS.[285] If, for example, the claim was that the message at the meetings might be changed because of the sensibilities of those attending, that might happen regardless of the membership status of those who were present—messages might be toned down because the non-members at the meeting would otherwise be offended by inflammatory rhetoric.

D. Forum Analysis

The *Martinez* Court explained that the Hastings student club program was a limited public forum.[286] Hastings imposed various limitations on any group wishing to be part of the officially recognized "'Registered Student Organization' (RSO) program."[287] For example, recognition was only open to groups that were non-commercial and whose membership was limited to students at the law school.[288] An additional requirement was that all RSO groups accept all comers.[289]

Some commentators suggest that content-based restrictions would also have been permissible if, for example, the group's purpose was not at all related to the school's purposes in providing a legal

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282. *See* Lawrence, *supra* note 256, at 654 (discussing the "three years of law school").

283. *See* Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. ___, ___, 130 S. Ct. 2971, 2989–90 n.18 (2010).

284. *See Rotary Club of Duarte*, 481 U.S. at 541; Roberts v. United States Jaycees, 468 U.S. 609, 627 (1984).

285. *See Martinez*, 130 S. Ct. at 2992 ("CLS points to no history or prospect of RSO-hijackings at Hastings.").

286. *See id.* at 2984.

287. *Id.* at 2979.

288. *Id.*; *see also* Volokh, *supra* note 211, at 1935 (discussing why a university might reasonably require that the groups be run by students).

289. *Martinez*, 130 S. Ct. at 2979.

education.[290] Perhaps that is so, although *Rosenberger* and *Southworth* suggest that content-based restrictions on student clubs in the university context may be harder to defend than might originally be thought.[291] Justice Anthony Kennedy noted in his concurrence that "[t]he Hasting [*sic*] program is designed to allow all students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities."[292] It is simply unclear whether content limitations in such a forum would have been characterized as viewpoint-based and hence unacceptable.[293] In any event, the restriction at issue was not content-based,[294] i.e., the school did not limit eligibility to those groups that addressed only certain topics.

The *Martinez* Court explained that the Hastings limitations on the public forum would be evaluated in light of a reasonableness standard,[295] and commentators have debated the reasonableness of the Hastings policy.[296] For example, there is some debate whether

290. *See* Bhagwat, *supra* note 98, at 556–57 ("Hastings could also, presumably, limit its RSO program to groups whose objectives the school considered sufficiently related to its program of legal education.").

291. *See supra* notes 61–85 and accompanying text (discussing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) and Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000)).

292. *Martinez*, 130 S. Ct. at 2999 (Kennedy, J., concurring).

293. Consider some of Justice Kennedy's comments in concurrence. "When the government does exclude from a limited forum, however, . . . content-based judgments may be impermissible. For instance, an otherwise qualified and relevant speaker may not be excluded because of hostility to his or her views or beliefs." *See id.* at 2998 (citing Healy v. James, 408 U.S. 169, 187–88 (1972)).

294. *Id.* at 2996 (Stevens, J., concurring) ("As written, the Nondiscrimination Policy is content and viewpoint neutral.").

295. *Id.* at 2988 (majority opinion).

296. *See* Brownstein & Amar, *supra* note 255, at 510 ("[T]he Hastings policy still had to be reasonable. But given its open-endedness, what purposes does the RSO policy really serve? Does a policy that allows any group, formed around any set of ideas or activities, to exist--but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities--make much sense?"); Erica Goldberg, *Amending* Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 TEX. J. C.L. & C.R. 129, 154 (2011) ("[I]t is unreasonable to establish a forum for expression but not protect an organization's ability to safeguard its expression when choosing members."); Massaro, *supra* note 35, at 578 (describing CLS's position on the reasonableness of such a policy: "CLS is an expressive association that exists primarily, if not exclusively, to advance particular

educational goals would be best served by bringing about diversity within[297] rather than across groups.[298] Thus, if student groups with open membership policies would indeed have more diverse memberships,[299] and if groups with more diverse memberships would have a greater diversity of views being represented within the student groups,[300] then one might expect that the Hastings policy might "facilitate interactions between students, enabling them to explore new points of view . . . ."[301] In addition, "an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, 'encourages tolerance, cooperation, and learning among students.'"[302] Indeed, a student who had been a member of the predecessor Christian student group, Hastings Christian Fellowship, had spoken about the benefits of having an openly gay student as a member.[303]

At issue before the Court was not whether the Hastings policy was the best policy or even whether it was the most reasonable, but

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ideas. To require it to yield to conditions that subvert its message and associational cohesion was beyond coercive; CLS characterized it as 'absurd.'").

297. *See* Brownstein & Amar, *supra* note 255, at 524 ("The alleged benefits of the policy were that it promoted internal discussion and debate within groups, protected dissenters within a group who wanted their views considered without fearing expulsion, and guaranteed students whose fees subsidized RSOs that they would be permitted to join any group their student fees supported."); Thro & Russo, *supra* note 256, at 494–95 ("Instead of having competition *among* student organizations, there will be competition *within* student organizations.").

298. *See* Linda C. McClain, *Religious and Political Virtues and Values in Congruence or Conflict?: On* Smith, Bob Jones University, *and* Christian Legal Society, 32 CARDOZO L. REV. 1959, 2001 (2011) ("Is this self-exploration best achieved through maximum diversity among different groups or by promoting diversity *within* groups?").

299. *See supra* note 254–55 and accompanying text (noting that this is an empirical question).

300. An individual dissenter in a particular group might not feel comfortable voicing that dissent. *Cf.* Carole J. Buckner, *Realizing* Grutter v. Bollinger's *"Compelling Educational Benefits of Diversity"— Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 888 (2004) ("[S]tudents often choose silence as a way of protecting themselves from a hostile environment in and out of the classroom.").

301. Christian Legal Soc'y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. ___, ___, 130 S. Ct. 2971, 2999 (2012) (Kennedy, J., concurring).

302. *Id.* at 2990 (majority opinion) (citation omitted).

303. *See id.* at 2990 n.19.

simply whether it was reasonable.[304] Whether or not one wished to defer to the judgment of the Hastings administrators,[305] this policy seemed reasonable, even if different policies would also have been reasonable.[306] Because Hastings had adopted a rationally justifiable way of balancing competing interests,[307] the Court held that "Hastings' all-comers policy . . . is a reasonable, viewpoint-neutral condition on access to the student-organization forum."[308] This meant that the Hastings' policy passed constitutional muster,[309] and the club could not receive the benefits of being a recognized student organization without also meeting the relevant conditions and having an open-access policy.[310]

The benefits of having that status included being "eligible to seek financial assistance from the Law School,"[311] as well as being able to "use Law–School channels to communicate with students: They may place announcements in a weekly Office–of–Student–Services newsletter, advertise events on designated bulletin boards, send e-mails

304. *See id.* at 2992.

305. *See id.* at 2989 (discussing the Court's giving "appropriate regard for school administrators' judgment").

306. *See* Volokh, *supra* note 211, at 1943–44 ("The university is providing the forum to help advance what it sees as its mission of educating the students, or at least providing them with an interesting intellectual and social environment. If the university decides that organizations with certain structures are especially useful to that mission, the university should be entitled to support those organizations, even if others may think that a more flexible approach would be better.").

307. *Martinez*, 130 S. Ct. at 2993 ("Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.").

308. *Id.* at 2978. *See also* Volokh, *supra* note 211, at 1941 ("[O]ne can equally argue that a university is entitled to subsidize only groups that are accessible to university community members without regard to race, religion, and the like.").

309. *See* Massaro, *supra* note 35, at 582–83 ("[I]f the government were required to exempt expressive associations from its conditions on access, this would defeat the very point of limited access forums. The definition of such forums is that they are restricted by the government to topics or categories of speakers.").

310. *See* Epstein, *supra* note 127, at 121–22 ("In a critical passage, [Justice Ginsburg] notes that Hastings does not impose any positive restrictions on what CLS can do off campus with its own resources, but only indicates that it has to accept reasonable conditions in order to be eligible for the benefits that Hastings metes out to the various registered student organizations.").

311. *Martinez*, 130 S. Ct. at 2979.

using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts."[312] In addition, such groups were permitted to "apply for permission to use the Law School's facilities for meetings and office space,"[313] and recognized groups were permitted to use the school's "name and logo."[314] Basically, the school was suggesting that a condition of receiving these benefits was that the group employ an all-comers policy.[315] Unless the group was willing to do that, it would have to forego some of the state-provided benefits.[316]

Yet, it was not as if the groups not having RSO status had been entirely barred from campus. The *Martinez* Court noted that Hastings had "offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events."[317] The Court also noted some of the ways that "the advent of electronic media and social-networking sites" reduced the disadvantages of CLS not having RSO status.[318]

E. Treating the Speech and Association Claims Together

The *Martinez* Court understood that there were two lines of cases that were relevant—speech and association—and noted that CLS wanted the Court to "engage each line of cases independently."[319] The Court rejected that invitation, arguing that it "makes little sense to treat CLS's

312. *Id.*

313. *Id.*

314. *Id.*

315. *See id.*

316. *See id. See also* Volokh, *supra* note 211, at 1922 ("Groups have the constitutional right to put on events and programs open only to blacks, heterosexuals, men, or religious believers; they may also put on programs open to all listeners but designed by group officers who are chosen in discriminatory ways. Yet the government need not subsidize this right, just as the government need not subsidize the rights to abortion, private schooling, or political expression about candidates or about legislation.").

317. *Martinez*, 130 S. Ct. at 2991.

318. *Id.*

319. *Id.* at 2985.

speech and association claims as discrete,"[320] and instead suggesting that the "limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights."[321]

One of the surprising aspects of the *Martinez* opinion was the Court's implicit suggestion that CLS *might* have won under the right of association jurisprudence.[322] The Court noted that "it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[323] Yet, the arguments that won the day in *Roberts* should have won the day here. For example, the *Martinez* Court quotes the *Roberts* Court's recognition that "'there can be no clearer example of an intrusion into the internal structure or affairs of an association than' forced inclusion of unwelcome participants."[324] But that recognition did not prevent the *Roberts* Court from requiring the Jaycees to open up their regular membership, given the lack of evidence that doing so would change the message.[325] The same reasoning should have yielded the same result in *Martinez*.

Dale would seem to provide a counter-example to the claim that *Martinez* is following the existing jurisprudence,[326] and the *Martinez* Court noted and then distinguished that case.[327] However, *Dale* was also difficult to reconcile with the jurisprudence preceding it.[328] Thus, with the exception of *Dale*, *Martinez* should have been decided the same way even if the right of association strand had been considered separately.

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320. *Id.* (citing Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 300 (1981)).

321. *Id.*

322. *See id.*

323. *Id.*

324. *Id.* at 2986 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

325. *See Roberts*, 468 U.S. at 626–27.

326. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000) (deferring to the Boy Scouts with respect to whether forced inclusion would change the organization's message). *See also id.* at 655 ("The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes.").

327. *See Martinez*, 130 S. Ct. at 2986; *Dale*, 530 U.S. at 648.

328. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (rejecting that mere assertion that an organization's message would change because of forced association suffice for constitutional purposes).

Commentators disagree about whether the Court's merging the speech and association claims was noteworthy[329] or even somehow precluded by the prior jurisprudence.[330] For example, Professor Erica Goldberg argues that "the primary reason that protections for expressive association cannot be merged with speech protections is that expressive association contains both speech elements (the expression of the group and its members) and conduct elements (the act of excluding or including members in order to promote that expression)."[331] In her view, "the viewpoint-neutrality test governing speech restrictions in a limited public forum must be modified in recognition of the hybrid nature of expressive association."[332] Of course, there are additional ways to view the religious group's purpose, e.g., as "a forum in which similarly thinking individuals could share and reaffirm their values and worship together."[333] While that is true, *Roberts* suggested that the forum analysis would be the same whether it was being used for expression or religious exercise,[334] which

329. *See* Bhagwat, *supra* note 98, at 546 ("[T]his decision by the Court to merge the associational claim into a free speech claim was a critical step–I will argue the critical misstep–in its analysis; but it nonetheless went unremarked on by the dissent"); B. Jessie Hill, *Property and the Public Forum: An Essay on* Christian Legal Society v. Martinez, 6 DUKE J. CONST. L. & PUB. POL'Y 49, 51 (2010) ("What may be more noteworthy is that the Court extended forum analysis to CLS's freedom-of-association claim as well.").

330. *See* Zachary R. Cormier, Christian Legal Society v. Martinez: *The Death Knell of Associational Freedom on the College Campus*, 17 TEX. WESLEYAN L. REV. 287, 290 (2011) ("*Martinez* was not a merger between free speech and associational rights, but rather a complete eradication of associational rights in deference to existing free speech analysis within a public forum."); Goldberg, *supra* note 296, at 131 ("[T]he Court merged the expressive-association claim of the Christian Legal Society ("CLS") student organization with its speech claim, essentially negating independent protection for CLS's right to expressive association."); David Brown, Comment, *Hey! Universities! Leave Them Kids Alone!:* Christian Legal Society v. Martinez *and Conditioning Equal Access to a University's Student-Organization Forum*, 116 PENN ST. L. REV. 163, 180–81 (2011) ("The Court's decision to merge the claims and apply public forum analysis allowed the Court to ignore the Society's free association claim and sidestep the more difficult strict scrutiny test.").

331. Goldberg, *supra* note 296, at 157–58.

332. *Id.*

333. Bhagwat, *supra* note 98, at 553.

334. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment–speech, assembly, petition for the redress of grievances, and the exercise of religion.").

may be one of the reasons that this additional purpose of the organization was not emphasized. If, indeed, the Court is making a mistake by merging the expression and association claims, it is one that has been made in the association cases since *Roberts* and thus should not be attributed to the *Martinez* Court as some kind of break with the past jurisprudence.[335]

There is a much different way to read the *Martinez* Court's suggestion that the case might have turned out differently had the Court considered the right of association strand separately. While the *Roberts-Rotary-New York* line is perfectly compatible with *Martinez* in that the Court upheld antidiscrimination norms in all of these cases where there was no showing that the group's message had been altered by the forced inclusion of undesired members, it *may* be that the *Martinez* Court was implicitly trying to re-characterize the past jurisprudence. The Court may have been attempting to sharpen the distinction between enforcement of antidiscrimination norms in a limited public forum and enforcement of such norms elsewhere, past case law notwithstanding.[336]

By implying that the Hastings policy might not have passed muster under the right to association jurisprudence and by implying that a similar standard was used in *Roberts* and *Dale*,[337] the *Martinez* Court suggests that it is very difficult for the state to be able to justify forcing a group to associate with those with whom the group does not wish to associate. But *Roberts*, *Rotary*, *New York*, and *Rumsfeld* all suggest that the state can override the right to associate as long as it does not thereby alter a group's message. Perhaps the *Martinez* opinion is less noteworthy for its suggesting that antidiscrimination norms can be applied to an organization in a limited public forum where there is no evidence of message change than in its implicit attempt to boost what must be shown

335. Bhagwat, *supra* note 98, at 549 ("[T]he key error made by *all* the Justices in *Martinez* was to treat the case as one primarily about the right of free speech, rather than about freedom of association. That error was profound, and it led the Court into a frankly nonsensical analysis; but it was also unsurprising. The Court's miscues in *Martinez* are rooted in half a century of jurisprudence in which the Court has essentially eviscerated the First Amendment's right of association.").

336. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. ___, ___, 130 S. Ct. 2971, 2985 (2010) (discussing the Court's applying "a less restrictive level of scrutiny to speech in limited public forums, as compared to other environments").

337. *See id.*

by the state in other fora when attempting to apply antidiscrimination norms in a way that will overcome associational rights.

V. CONCLUSION

The Court's First Amendment jurisprudence with respect to speech and association has been evolving in surprising ways. While it is clear that content discrimination is impermissible in general public fora and that viewpoint discrimination is impermissible regardless of forum, the Court has had some difficulty in figuring out whether a limitation is content or viewpoint based in limited public fora. But that distinction is crucial in that forum in particular because content discrimination in limited public fora is examined in light of a reasonableness standard, whereas viewpoint discrimination in that same fora is examined with strict scrutiny.

The Court sometimes implies that content discrimination in the university, a limited public forum, will be very difficult to justify, at least if student groups are involved. However, the Court has been quite amenable to other kinds of limitations, for example, limiting such groups to students. *Martinez* suggests that the viewpoint-neutral approach should also be used when determining whether a university can require that student groups respect nondiscrimination principles, at least where it is not shown that the nondiscrimination policy will result in a significant change in message. That same policy reflects the Court's approach in the right to association jurisprudence. Thus, state regulations will be struck down only when significantly altering organizations' messages,[338] although it is of course quite tempting to wonder why the Court finds an impairment of message in some cases but not in others.[339]

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338. *See* Nice, *supra* note 279, at 660 ("One possible key to understanding the Court's divergent reasoning was the Court's finding that forcing speakers to include gays would impair their messages in *Hurley* and *Dale*, whereas the Court found no such impairment in *Martinez*.").

339. *Cf. id.* ("So how does the presence of a gay person impair the message of the St. Patrick's Day parade and the Boy Scouts, but not the message of fundamentalist Christians?").

Martinez is less noteworthy for what it held[340] than for some of the things that it did not do. For example, it did not follow a *Dale* path and defer to an organization's claim of message alteration.[341] At the same time, *Martinez* did something else by suggesting that the right of association is very strong when the forum has not been limited. What remains to be seen is whether the evolving jurisprudence will treat *Martinez* as standing for the general proposition that the right to association can be trumped by antidiscrimination norms as long as the organization's message has not been significantly altered or, instead, whether the right to association will now be thought more robust when a limited public forum is not at issue. Ironically, those claiming that *Martinez* signals the end of rights of association may well be relying on *Martinez* in the future to support their right of association claims outside the limited public forum context.

340. *See* Hill, *supra* note 329, at 57 ("[T]his failure to say anything of real importance is perhaps the most surprising thing about the Court's decision in *CLS v. Martinez*.").

341. *Cf.* Epstein, *supra* note 127, at 120 ("*CLS* is a far easier case for freedom of association than was *Dale*.").

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